

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GARY O. WILSON)	DOCKET NUMBER
)	SF04328410092
v.)	
DEPARTMENT OF THE NAVY)	DATE: 4 DEC 1984
)	

OPINION AND ORDER

Gary O. Wilson (appellant) petitioned for appeal of the action taken by the Department of the Navy (agency) demoting him from his position of Warehouse Worker, WG-6907-6, step 5 to Warehouse Worker, WG-6907-5, step 1. The agency initiated the action for unacceptable performance pursuant to the provisions of 5 U.S.C. § 4302 and 5 C.F.R. Part 432 and it was effective October 2, 1983.^{1/}

^{1/} 5 C.F.R. § 432.203 provides, in part:

(a) At any time. Pursuant to the requirements of this subpart, an employee may be reduced in grade or removed at any time during the performance appraisal cycle that the employee's performance in one or more critical elements of the job becomes unacceptable.

(b) Reasonable time. The agency shall identify for the employee the critical element(s) for which performance is unacceptable and give the employee a reasonable time to demonstrate acceptable performance before proposing a reduction in grade or removal under this part.

In an initial decision dated February 21, 1984, a presiding official from the Board's San Francisco Regional Office reversed the agency action. The presiding official determined that the agency had failed to establish that appellant's performance was unsatisfactory prior to April 1, 1983, the date on which appellant received a "Letter of Requirement" from the agency informing him of the need to improve his performance in his critical element^{2/} involving shelf life responsibility.^{3/} The agency has petitioned for review of the initial decision. The agency's petition for review is GRANTED.

Pursuant to the terms of the April 1, 1983, letter of requirement, appellant was informed he had thirty days to improve his performance to an acceptable level and that further unsatisfactory performance would result in reassignment, reduction-in-grade or removal. I.D. at 3. Following the issuance of the letter of requirement, appellant's performance continued to be unsatisfactory as to the shelf life critical element. Id. at 4. Appellant's supervisor proposed appellant's demotion in a letter dated August 2, 1983, noting appellant's deficiency in the shelf life critical element during the period of April and May

^{2/} "Critical element" is defined at 5 C.F.R. § 430.202 as follows:

"Critical element" means a component of an employee's job that is of sufficient importance that performance below the minimum standard established by management requires remedial action and denial of a within-grade increase, and may be the basis for removing or reducing the grade level of that employee. Such action may be taken without regard to performance on other components of the job.

^{3/} Appellant's shelf life responsibilities related to care and record keeping of certain aircraft and aircraft related items which deteriorated over time. See Initial Decision (I.D.) at 2.

1983. Id.; Appeal file, tab 1. Appellant responded to the notice orally and with written submissions. By decision letter dated September 27, 1983, appellant was reduced in grade effective October 2, 1983. I.D. at 4.

In the initial decision, the presiding official noted "[m]y problem with the agency's case is that while the evidence shows that appellant made errors during the 30 day improvement period, there is inadequate evidence that his performance up until that time was unsatisfactory." Id. at 6. He therefore found the agency had failed to carry its burden of proof.

In its petition for review, the agency contends that the presiding official misapplied the statutory and regulatory provisions applicable to performance-based actions. Specifically, the agency notes the requirements of 5 U.S.C. §§ 4302-4303 and 5 C.F.R. Part 432, and contends that it met all applicable requirements in effecting appellant's demotion.

5 U.S.C. § 4302(b)(6) provides that employees may be removed or demoted due to unacceptable performance, but only after an opportunity to demonstrate acceptable performance. 5 U.S.C. § 4303, entitled "Actions based on unacceptable performance," includes the following:

(b)(1) An employee whose reduction in grade or removal is proposed under this Section is entitled to --

(A) 30 days' advance written notice of the proposed action which identifies --
(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and
(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

In the instant case, appellant was provided with notice, on April 1, 1983, that he had to improve his performance. The presiding official also noted that during the period

following appellant's receipt of the letter of requirement, appellant's supervisor regularly counseled appellant and offered him assistance and training advice. I.D. at 3. The evidence indicates that the agency thus met the requirement of 5 U.S.C. § 4302(b)(6) of providing appellant an opportunity to improve his performance. Sandland v. General Services Administration, MSPB Docket No. PH04328310205 at 4-10 (October , 1984).

The agency based its decision to demote appellant on appellant's performance following the issuance of the letter of requirement. See Decision Letter, dated September 27, 1983, Appeal File, tab 1. The presiding official agreed that appellant did make "errors" during this period. I.D. at 6. However, the presiding official apparently determined that the agency had to establish, by substantial evidence, that appellant was performing unsatisfactorily prior to the issuance of the letter of requirement in order to sustain the demotion.

We can find no statutory or regulatory basis to support the presiding official's conclusion concerning such a showing. In the instant case, the agency issued appellant a letter notifying him of the need to improve his performance, and afforded appellant ample opportunity and assistance to make such improvement. The presiding official noted that appellant's performance prior to the issuance of the letter of requirement might have been unsatisfactory in some areas. See I.D. at 3; April 1, 1983 Letter of Requirement, Appeal File, tab 1. However, the presiding official refused to consider these deficiencies in judging the validity of the demotion action, apparently on the grounds that the agency did not rely on the pre-requirement letter deficiencies in deciding to demote appellant. See I.D. at 4, n.4. We find that the agency could properly consider appellant's performance following the issuance of

the requirement letter in order to determine if appellant's performance fell short of satisfactory as to any critical element for his position and, thus, whether the demotion was justified. The presiding official erred in his apparent determination that the action demoting appellant could not be upheld absent a finding that the agency referenced unacceptable performance prior to the issuance of the requirement letter in its notice of proposed demotion and its decision letter.

In the initial decision, the presiding official found it unnecessary to make a finding on whether or not appellant's performance following the issuance of the letter of requirement was satisfactory. See I.D. at 7. However, in light of our discussion, supra, such a finding is necessary. We cannot make such a finding on the basis of the record as it exists before us. Therefore, we find it necessary to remand the case to the presiding official for a finding on this point.

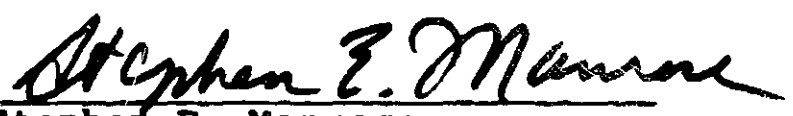
Following the issuance of the initial decision, we issued our decision in Griffin v. Department of the Army, MSPB Docket No. CH07528210163 (October , 1984). In Griffin, we held that in an appeal of an agency's Chapter 43 performance-based demotion or removal action, the agency has the burden of proving by substantial evidence that it took the action against appellant pursuant to a performance appraisal system approved by the Office of Personnel Management (OPM).

It appears from the documentary record in this appeal that this issue was not raised at the Regional Office level before the record closed. It also appears there was no proof proffered to establish that OPM had approved the agency's performance appraisal system under which it took action against the appellant. Given the fundamental significance of this requirement for effecting actions under 5 U.S.C.

Chapter 43, as discussed in Griffin, we conclude that further evidentiary submissions are appropriate with regard to this issue only.

Accordingly, the Board hereby VACATES the initial decision dated February 21, 1984, and REMANDS the matter to the San Francisco Regional Office. Upon remand, the presiding official shall determine whether appellant's performance following the issuance of the letter of requirement, and as charged in the letter of proposed reduction-in-grade, was unsatisfactory. The presiding official shall also allow the agency to submit evidence regarding OPM approval of its performance appraisal system, and allow the appellant to submit rebuttal evidence.^{4/} If a presiding official finds on remand that appellant's performance was in fact satisfactory as to his critical elements, the agency action shall not be sustained. The agency action will also not be sustained if the agency fails to submit substantial evidence which shows that it had obtained OPM approval of its performance appraisal system, or if appellant successfully rebuts the agency evidence on this issue.

FOR THE BOARD:


Stephen E. Manrose
Acting Clerk of the Board

Washington, D.C.

^{4/} Although the documentary record does not reflect that this issue was raised before the close of the record, on remand the presiding official shall first give the parties an opportunity to establish whether the issue was otherwise raised below. If this issue was raised below in such a manner that the parties had an opportunity to address it, but did not, the parties shall not be provided a second opportunity to do so on remand. The presiding official shall then determine, based upon the existing record, whether the agency has proved by substantial evidence that OPM had approved the applicable performance appraisal system.